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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, MIWAKO S. MURABAYASHI, WILLIAM H. EBINA, BETSY S. EBINA, and DURINE CHIYO KANAI,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:

Richard R. Clifton
Susan Oki Mollway
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200

*Theodore B. Olson
Larry L. Simms
Paul Blankenstein
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

The district court granted summary judgment in favor of petitioner Honolulu Federal Savings and Loan Association. Respondents, who did not cross-move for summary judgment, maintained that summary judgment was inappropriate for either party because of disputes as to material facts bearing on the underlying substantive legal issue. The court of appeals reversed and in effect directed the entry of judgment for respondents on a legal theory that had not been addressed by the parties in either court. The case presents the following questions:

1. Whether federal courts of appeals may reverse an award of summary judgment and direct judgment for the nonmovant when to do so would deprive movants of the opportunity to remedy or even respond to the defect in their cases identified for the first time on appeal.

2. Whether federal courts of appeals may, in any event, direct judgment for the nonmovant when the nonmovant opposed summary judgment on the ground that genuine disputes of material fact exist and conceded on appeal that such disputes precluded summary judgment in its favor.*

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*The parties are named in the caption. Respondents brought the case as a class action purporting to represent a class of similarly situated customers of petitioner. The district court declined to certify a class, however.

Petitioner Honolulu Federal Savings and Loan Association, which is a federally chartered savings and loan association, is a wholly owned subsidiary of H.F. Holdings, Inc. Petitioner also owns a 20 percent interest in SLH, Inc., and through its wholly owned subsidiary HonFed Financial Services Corporation, also owns a 30 percent interest in Wespar Financial Services, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On appeal from the district court's grant of petitioner's motion for summary judgment, the Ninth Circuit erroneously reversed and then, over the dissent of Judge Wallace, compounded that error by effectively directing the entry of judgment for respondents. These actions respectively denied petitioner its right under Rule 56 of the Federal Rules of Civil Procedure to establish that a triable issue exists, and its complementary right to present at trial all evidence relevant to disputed issues of fact that remained in the case. Under this decision and similar recent decisions of the federal appellate courts, litigants predictably will refrain from moving for summary judgment out of a justifiable concern that, even if they are successful, a federal court of appeals may reverse and enter judgment for the opposing party on a new legal theory without affording them the opportunity on remand to develop fully and litigate disputed facts relevant to that new legal theory. The decision below is so grossly in error, its impact on the petitioner so unduly harsh, and its potential adverse affect on summary judgment procedure so substantial that it must be set aside in the exercise of this Court's supervisory authority over the federal judiciary. Accordingly, petitioner prays that a writ of certiorari issue to review the judgment and opinion in this case.

OPINIONS BELOW

The unreported opinions of the district court dated November 2, 1982 and September 7, 1983, which to-

gether dismissed certain claims as time barred and granted summary judgment to the petitioner on the remaining claims, are reproduced in App. A, 1a-12a. The unpublished (and therefore unreported) opinion of the Ninth Circuit dated October 1, 1984, affirming in part, reversing and remanding in part, is reproduced in App. B, 13a-16a. The unreported August 11, 1986 opinion of the district court on remand, again granting summary judgment to the petitioner, is reproduced in App. C, 17a-25a. The unpublished (and unreported) June 3, 1988 opinion of the Ninth Circuit, reversing and remanding with instructions that in effect direct the entry of judgment for the respondents, is reproduced in App. D, 26a-30a.

JURISDICTION

The opinion of the court of appeals was issued on June 3, 1988. App. D, 26a. Petitioner's timely petition for rehearing was denied by the Ninth Circuit on September 6, 1988. App. E, 31a-32a. On November 28, 1988, Justice O'Connor issued an order extending to January 4, 1989, the time within which petitioner could file this petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,. . ., move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law . . . .

* * *

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

STATEMENT OF THE CASE

A. Introduction

Respondents filed this action in 1981 to challenge a decision by petitioner, Honolulu Federal Saving and Loan Association (HonFed), to raise interest rates on certain loans by 1 percent. Initially, the district court entered summary judgment for HonFed, holding that the loan documents allowed the challenged interest rate increase. The Ninth Circuit reversed, holding that the loan documents were ambiguous regarding the aggregate amount by which the interest rate could be increased. The court remanded the case to allow the parties to present extrinsic evidence to resolve the perceived ambiguity.

On remand, the parties each produced extrinsic evidence: by HonFed in support of its motion of summary judgment, and by respondents, who did not cross-move, in opposition thereto. The district court granted HonFed's motion, concluding that the evidence indisputably established that under the terms of the loan agreements HonFed could raise interest rates by at least 1.5 percent each year—an amount more-than sufficient to permit the 1981 rate increase. Without purporting to disagree with the trial court's evaluation of the summary judgment record, the Ninth Circuit again reversed, holding that HonFed had not "met its burden" to resolve the ambiguity in the loan documents.

In reaching its result, the Ninth Circuit redefined HonFed's burden to require it to show by extrinsic evidence that the loan agreements authorized it to raise interest rates by as much as 6 percent annually. The Ninth Circuit then in effect directed judgment

for respondents without affording HonFed any opportunity to meet this newly announced burden. The court took this unusual action, over the dissent of Judge Wallace, despite the fact that respondents had expressly acknowledged that factual disputes regarding the amount by which interest rates could be raised precluded summary judgment in their favor.

B. The History Of The Litigation

In 1964, HonFed made various home loans to respondents. As relevant here, the promissory notes executed by respondents each provide that HonFed "at any time after three (3) years from the date of this note, and from time to time thereafter, may upon . . . three (3) months' written notice . . . increase the interest rate *then in effect* by not more than one and one-half percent (1 $^1/_2$%) per annum . . . ." App. A, at 6a (emphasis added). The parallel provisions in the accompanying mortgage agreements were identical except that they provide that HonFed could "increase the rate of interest *on said note* by not more than one and one-half percent (1 1/2%) per annum," upon giving respondents appropriate notice.[1] App. A, at 7a (emphasis added).

The original interest rate on each of the loans at issue was 6.25 percent. In 1974, HonFed increased the interest rate by 1.5 percent to 7.75 percent per annum. Respondents did not object to that interest rate increase.

Seven years later, in 1981, HonFed increased the interest rate again, this time raising it 1 percent,

[1] The respective interest rate increase provisions of the promissory notes and mortgage agreements shall be referred to collectively as the "escalation clauses."

from 7.75 to 8.75 percent. This time, however, respondents objected and filed suit asserting claims under various federal and state laws.[2] The gravamen of the action was that the 1981 rate increase was not authorized because the loan agreements—specifically the mortgage—precluded HonFed from raising the interest rate more than 1.5 percent over the original interest rate during the life of the loans.

HonFed moved to dismiss certain claims on statute of limitation grounds and sought summary judgment on the remaining claims. In its summary judgment motion, HonFed argued that while the escalation clauses limited each interest rate increase to no more than 1.5 percent, the frequency—and therefore the aggregate amount—of such increases was only limited by the three-month notice provision. The district court dismissed two claims on limitation grounds and, agreeing with HonFed's construction of the loan documents, granted summary judgment on the remaining claims.[3] App. A, at 12a.

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[2] Respondents' amended complaint contained five counts. Count I was for a declaratory judgment that the 1981 interest rate increase was barred by the loan agreements, while Counts II and III asserted claims under state law for failure to make accurate and complete disclosure on the financing statements that accompanied the loans. Count IV charged violation of the federal Truth-In-Lending Act, and Count V alleged deceptive and unfair trade practices under state law.

[3] The district court's decision of November 2, 1982, dismissed Counts II and III of respondents' amended complaint, and granted summary judgment as to Count I. App. A, at 8a. On September 7, 1983, the court issued an order granting petitioner's motion for summary judgment as to Counts IV and V. App. A, at 12a.

On the initial appeal of this case, the Ninth Circuit affirmed that part of the district court's ruling dismissing certain claims on statute of limitations grounds. The court, however, overturned the summary judgment in favor of HonFed on the remaining claims. The court acknowledged that the promissory notes allow HonFed "from time to time" to increase the interest rate from the rate "then in effect." App. B, at 15a. The court observed, however, that the mortgage agreements, which permit HonFed to raise the interest rate over the rate "on said note," did not contain the same phrase, "then in effect," as did the notes. The court reasoned that it was "unclear whether the phrase 'on said note' means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan." *Id.* Concluding that this "ambiguity" made the loan agreements " 'susceptible to more than one meaning'[,]" the Ninth Circuit instructed the district court on remand to permit the parties "to present extrinsic evidence to establish the terms of the home loan agreements[,]" with particular reference to the "amount of interest rate increase contemplated . . . ." *Id.*, at 15a-16a.

On remand, both sides conducted discovery to obtain extrinsic evidence with respect to the interest rate increase contemplated by the loan agreements. Moving again for summary judgment, HonFed offered the deposition testimony of six current or former officers and employees. The thrust of that testimony was that the loan agreements "allowed HonFed to increase the interest rate by as much as one and one-half percent (with three months notice), and that

HonFed could do so as often as once every year." App. C, at 20a. Respondents did not file a cross-motion for summary judgment, but simply opposed HonFed's motion, arguing that material facts were in dispute as to the intent of the parties on the "key issue" whether HonFed could raise interest rates more than 1.5 percent over the life of the loans.[4]

After evaluating the extrinsic evidence and applying the governing standards for granting summary judgment, the district court again granted HonFed's motion. The court found that HonFed had "met the ultimate burden of persuasion," and that the evidence HonFed had produced was "so overwhelming that were the case to go to trial, the court would grant a motion for directed verdict under Fed. R. Civ. P. 50(a)." App. C, at 24a.

Respondents again appealed to the Ninth Circuit. This time they argued that HonFed's evidence that interest rates could be raised by at least 1.5 percent each year was inconclusive and that, therefore, a genuine issue existed as to the amount by which HonFed could increase interest rates. Respondents maintained that this dispute precluded summary judgment for either side and required a trial.[5]

In a divided decision, the Ninth Circuit again reversed the summary judgment in favor of HonFed and remanded the case to the district court with instructions in effect to enter judgment for respondents.

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[4] Plaintiffs' Memorandum In Opposition To Motion For Summary Judgment, dated July 14, 1986 (hereinafter "Plaintiffs' Opp."), at 2.

[5] Appellants' Opening Brief, No. 86-2503 (9th Cir.), dated September 18, 1987 (hereinafter "Appellants' Opening Brief"), at 17.

App. D, at 26a-30a. In its unpublished opinion,[6] that court declared that "HonFed had the burden of proving that the meaning of the mortgage, construed against it, did not control the note." *Id.*, at 29a. The court stated that the "face of the note" allowed HonFed to raise the interest rate by as much as 6 percent per year, but that HonFed's officers did not believe "that that was what the bank could get . . . ." *Id.*, at 28a. Thus, on the basis of what HonFed's officers "must have believed," the Ninth Circuit held that "the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest rate on the loan was a raise of 1 1/2 percent during the life of the loan." *Id.*, at 29a. On this basis, the court of appeals reversed the judgment below, and remanded the case for "further proceedings not inconsistent with this disposition." *Id.*. Given that the court had resolved the interest rate increase issue against HonFed, the effect of the remand was to direct the entry of judgment for respondents.

Judge Wallace dissented with respect to the court's disposition of the case. App. D, at 29a-30a. He observed that by deciding the dispute as to the maximum interest rate increase permitted, the panel had gone beyond the single issue before to it on appeal: "did the district court err in granting summary judg-

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[6] This decision, like the court's first opinion, was designated by the panel to be "unpublished" pursuant to Rule 36-3 of the Ninth Circuit's rules, which prohibits the citation of such opinions except where the unpublished decision involves issues of res judicata, collateral estoppel, or law of the case. App. D, at 26a; *see also* App. B, at 13a.

ment to HonFed[?]" *Id.*, at 29a. Consequently, although agreeing with the majority that HonFed's extrinsic evidence did not justify summary judgment in its favor, Judge Wallace stated that the court "should simply reverse the summary judgment for HonFed and remand for trial" or to allow respondents to "bring their own motion for summary judgment . . . ." *Id.*, at 30a.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION, WHICH EFFECTIVELY GRANTS JUDGMENT FOR RESPONDENTS, WARRANTS REVIEW BECAUSE IT IS CONTRARY TO THIS COURT'S CASES AND SERIOUSLY UNDERMINES THE EFFICACY OF THE SUMMARY JUDGMENT PROCEDURE ESTABLISHED BY RULE 56

In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), this Court reaffirmed that Rule 56 "summary judgment procedure is properly regarded . . . as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.*, at 327, quoting Fed. R. Civ. P. 1. Prior to *Celotex*, misapplication of fundamental Rule 56 principles by the lower courts had produced "a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial." Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984). Thus, in order to insure the continued vitality of summary judgment practice, the Court in *Celotex* made clear that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 U.S., at 327.

The decision below stands accepted Rule 56 principles on their head, converting the summary judgment procedure into a "catch penny contrivance to take unawary litigants into its toils and deprive them of a trial. . . ."[7] Under the approach of the Ninth Circuit, success on a summary judgment motion may turn out to be quite a mixed blessing. Indeed, HonFed paid a very high price for succeeding on its motion.[8] Had HonFed not moved for summary judgment or even had the district court denied the motion, the case would have almost certainly proceeded to trial as respondents have at all times maintained that a trial is necessary to resolve disputed materials facts bearing directly on the interest rate increase issue.

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[7] *Whitaker* v. *Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

[8] Although HonFed does not seek review of that part of the Ninth Circuit's decision that reversed the summary judgment in his favor, its failure to do so is in no way an agreement that the court below acted correctly in that regard. Rather, HonFed has refrained from pressing that issue in this petition because it does not view the state law questions involved in that part of the Ninth Circuit's decision to be worthy of this Court's consideration in the present posture of this case.

At trial, HonFed would have had the opportunity to present *all* relevant evidence to establish that the 1 percent interest rate increase in 1981 was permitted under the terms of the loan agreements. On the other hand, at the summary judgment stage, HonFed, as any other litigant seeking summary judgment, was not compelled to put on its entire case. Indeed, such a requirement would essentially destroy the purpose of Rule 56 to render the resolution of cases more efficient and economical. Furthermore, HonFed, as any other litigant seeking summary judgment, was precluded from supporting its motion with controverted testimony or documentary evidence. Such evidence, which might have been persuasive at trial, would have been plainly inappropriate for summary judgment because it calls upon the trier-of-fact to make credibility determinations or assess the weight of the evidence. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Ninth Circuit, however, directed judgment for respondents even though HonFed never had the occasion to develop and present its full case, and even though respondents admitted that they were not entitled to summary judgment because of disputed facts on the key issue in the case. As discussed more fully below, the harsh lesson of the Ninth Circuit's ruling is that a successful summary judgment movant not only may have victory erroneously snatched away on appeal, but also may have the appellate court deprive it of the opportunity to remedy or even respond to a previously unidentified defect in its case.

It is cold comfort to HonFed and other litigants who have been or may be similarly affected that the Ninth Circuit's ruling is contrary to this Court's de-

cision in *Fountain* v. *Filson*, 336 U.S. 681 (1949), which bars summary judgment to the nonmovant appellant where the appellee would thereby be deprived of the opportunity to meet a defect in its case identified for the first time by the appellate court. This Court has not, however, squarely addressed this issue for almost forty years, and during that time the lower federal courts have drifted further and further from its teachings. Indeed, in the last few years at least two certiorari petitions, including one from another Ninth Circuit decision, have been filed charging that those federal appellate courts had directed judgments for nonmoving appellants without affording the respective appellees the opportunity to demonstrate that there remained triable factual issues.[9]

Although a case involving the gross misapplication of Federal Rules of Civil Procedure may not, standing alone, normally warrant review by this Court, this case and the other recent cases portray a discernible, growing and significant erosion of the rule of *Fountain* v. *Filson* and, more generally, of the summary

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[9] *Potenze* v. *New York Shipping Assoc. Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987) (No. 86-1462); *Federal Savings and Loan Ins. Corp.* v. *Angell, Holmes & Lea*, 838 F.2d 395 (9th Cir.), *cert. denied sub nom. Van Voorhis & Skaggs* v. *Federal Savings and Loan Ins. Corp.*, 109 S. Ct. 127 (1988) (No. 88-4). In this court, the respondents in those two cases both argued that the courts of appeals had not violated the rule of *Fountain* v. *Filson*. Because of the uncertainty regarding whether *Fountain* had been followed, this Court may well have determined that neither case presented an appropriate vehicle for reinforcing the *Fountain* rule. No such impediment exists in this case because respondents have no colorable argument that *Fountain* was followed by the majority of the panel below.

judgment procedure so recently reinvigorated in *Celotex*. Unless halted, the adverse consequences of this disturbing trend may be expected to accelerate exponentially. Fewer and fewer litigants will be willing to move for summary judgment if the price of success in the district court also carries with it the prospect of an adverse appellate ruling depriving the movant of the right to develop its case more fully on remand.[10] Such uncertainty would necessarily undermine this Court's recent efforts to convince both bench and bar that Rule 56 is not a "disfavored" practice, but is one of "the principal tools by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial *with the attendant and unwarranted consumption of public and private resources*." *Celotex Corp.* v. *Catrett*, 477 U.S., at 327 (emphasis added).

Accordingly, the Court should exercise its supervisory authority over the federal judiciary by removing this obstacle to the effectiveness of summary judgment practice and, in doing so, remind the various federal courts of appeals that they must comply with the fundamental principles set forth in Rule 56. Indeed, following the precedent of *Fountain* v. *Filson*, the Court might choose to act summarily to send this case back to the district court for trial or to allow

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[10] The *in terrorem* impact of the decision below is not relieved by the fact that the Ninth Circuit's decision was designated as "unpublished." Indeed, as members of the bar become aware that filing a motion for summary judgment may not only lead to judgment for the opposing party in the court of appeals, but also that the court of appeals may reach that result on the basis of essentially "secret" law, the negative impact on the utilization of the summary judgment procedure will be exacerbated.

respondents to move for summary judgment—the course correctly advocated by Judge Wallace's dissent below.

A. HonFed Was Deprived Of The Opportunity To Establish The Existence Of A Genuine Issue Of Fact Precluding Summary Judgment For Respondents

Paying due regard to the rights of litigants to have disputed claims or defenses presented at trial, Rule 56 of the Federal Rules of Civil Procedure makes summary judgment available only when there is no genuine, triable issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S., at 327. So that the district court is fully advised as to any genuine disputes of fact, Rule 56 expressly requires that the party threatened with summary judgment be given notice and an adequate opportunity to respond. Fed. R. Civ. P. 56(c). And while recent authority holds that district courts may grant party summary judgment to a nonmoving party if no material facts are in dispute, *see Celotex Corp.* v. *Catrett*, 477 U.S., at 326, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720, at 34 (1983).

These fundamental principles certainly apply with equal, if not greater, force in the courts of appeals because the appellate forum is not at all well-suited to demonstrating the existence of genuine issues of fact.[11] Thus, although courts of appeals have granted

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[11] For example, if the nonmoving party has not had the op-

summary judgment to the nonmoving party in the rare case in which there is absolutely no uncertainty regarding the facts,[12] this Court has never explicitly sanctioned even that practice.

In *Fountain* v. *Filson*, *supra*, the Court granted certiorari and reversed, without further briefing of the merits, a decision of the D.C. Circuit that directed judgment for a nonmoving party on the basis of a new legal theory that neither the district court nor the parties had addressed. Although reserving decision on the broader issue whether an appellate court could ever order summary judgment for the nonmoving party, the Court in *Fountain* specifically condemned the practice when "the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case[,]" and the original movant "would have had such an opportunity if a proper motion had been made by his opponent in the trial court." 336 U.S., at 683. The Court concluded that the D.C. Circuit had erred in this regard because there had been no occasion in the district court for the petitioner there to dispute facts material to the legal theory adopted on appeal and not considered below. The decision of the Ninth Circuit in this case repeats that error.

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portunity to take full discovery, Fed.R.Civ.P. 56(f) permits the district court to refuse "the application for judgment," or to continue the matter so that the adverse party can take discovery in order to establish whether there is a genuine issue as to a material fact. *See Celotex Corp.* v. *Catrett*, 477 U.S., at 326.

[12] *E.g.*, *E.C. Ernst, Inc.* v. *General Motors Corp.*, 537 F.2d 105 (5th Cir. 1976); *see* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720, at 35.

It is, of course, essential that litigants "not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *see also Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976). Unless the issue was "clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment" *sua sponte* on appeal. *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1537 (D.C. Cir. 1984), *vacated and remanded on other grounds*, 471 U.S. 1113 (1985).

The Ninth Circuit's decision faults HonFed for not meeting its "burden" to resolve the ambiguity in the loan documents by presenting extrinsic evidence to support a right to raise interest rates by as much as 6 percent each year—what that court characterized as the "plain meaning" of the escalation clause in the promissory notes. App. D, at 28a. HonFed, however, had no reason prior to that decision to believe that to prevail on summary judgment, or even at trial, it had to establish the right to raise interest rates by that amount. The challenged 1981 rate increase was only 1 percent over the rate in effect since the 1974 increase. Whether HonFed had the right to raise the rate by as much 6 percent per year was, in the posture in which this case came to the Ninth Circuit on the second appeal, at most a purely academic and hypothetical question. Nothing in the court of appeals' first opinion put HonFed on notice that its burden on remand was to prove by extrinsic evidence that the parties to the loans intended interest rate in-

creases of as much as 6 percent each year. The Ninth Circuit did not clearly frame that as petitioner's burden, and neither the district court nor the parties treated it as such on remand.[13]

HonFed thus "was fully justified in that circumstance in not coming forward with proof" on the 6 percent issue, for it "had nothing to meet under the District Court's view of the [case]." *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 533 (1958). Accordingly, by denying HonFed an opportunity to present evidence supporting its ability to raise interest rates by 6 percent each year, the Ninth Circuit deprived HonFed of its fundamental right under the Federal Rules (and under the Constitution as well) to meet the case against it. *See, e.g., Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917) (due process prohibits entry of judgment by appellate court against a party when that party had no opportunity to present evidence on issue that was not considered by court below).

Moreover, had respondents anticipated the novel legal theory manufactured by the Ninth Circuit, which

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[13] Indeed, respondents' opposition to HonFed's summary judgment motion did not argue that summary judgment should be denied because HonFed had failed to show a right to raise interest rates by 6 percent; rather, respondents asserted that HonFed's evidence as to the intent of the parties was inconclusive as to whether the loan agreements allowed HonFed to raise interest rates by 1.5 percent each year, and that a trial was thus necessary to determine by exactly how much interest rates could be raised. Plaintiffs' Opp., at 4-5. As evidenced by the fact that it granted HonFed summary judgment, the district court did not understand HonFed's burden to require that it establish the right to raise rates by 6 percent per year.

they did not, and moved for summary judgment pointing to the absence of evidence supporting HonFed's right to raise interest rates 6 percent, which they did not, HonFed would have had the requisite notice and the opportunity to oppose that motion. Fed. R. Civ. P. 56(c). Testimony and other evidence might have been adduced to the effect that interest rate increases of 6 percent annually were within the scope of the loan agreements. Such evidence might or might not have been as "overwhelming" as the evidence that was presented in support of HonFed's motion for summary judgment. The crucial point, however, is that the court of appeals deprived HonFed of the opportunity to present evidence sufficient at least to raise a genuine factual issue and thereby withstand any summary judgment motion that respondents might have filed.

Thus, as in *Fountain* v. *Filson*, the court of appeals' ruling in favor of respondents was "made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." 336 U.S., at 683. HonFed was thus deprived of "the opportunity to remedy the defect which the appellate court discovered in its case." *Id. See, e.g.*, *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S., at 531-3 (where appellate court announces a legal standard that makes relevant factual questions that were not previously regarded by the parties as relevant, court may not direct judgment based on existing record, but must remand the case to the district court to allow the parties the opportunity to establish relevant facts).

The Ninth Circuit's failure even to cite *Fountain* v. *Filson* is silent testimony to the erosion that the

salutary rule announced in that case has suffered in the last forty years. Few litigants will gamble with summary judgment motions if the price of success in the district court also carries the possibility that an appellate court will enter judgment for the other side without giving the movant the opportunity to meet the case against it. As a result, summary judgment will be utilized less often, and cases that should be resolved by summary judgment will instead go to trial, thereby unnecessarily consuming public and private resources.

B. The Record Below Demonstrates The Existence Of Disputed Material Facts Precluding Judgment In Favor Of Respondents

In addition to the reasons already discussed, the Ninth Circuit should not have directed judgment in favor of respondents because even the summary judgment record, without further supplementation as HonFed was entitled to do on remand, indicated that a genuine triable issue existed as to whether the loan agreements limited HonFed to an aggregate 1.5 percent interest rate increase, or permitted HonFed to raise rates by as much as 6 percent per annum.

Under Rule 56, it is axiomatic that summary judgment is proper only if there is no dispute as to any material fact. *Fountain* v. *Filson*, 336 U.S., at 683. The burden, of course, is on the party seeking summary judgment to establish the absence of any "genuine issue" of material fact, with any doubt as to the existence of a triable issue to be resolved against the moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Consequently, summary judgment should not be granted unless it is clear that a trial

is unnecessary. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S., at 255.

In assessing the propriety of summary judgment, the district court makes the threshold determination whether there "are any genuine factual issues that properly can be resolved only by a finder of fact . . . ." *Id.*, at 250. This standard mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Id.*, at 251; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944). In essence, the test under each is the same: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S., at 251-52. The court may not, however, "weigh the evidence and determine the truth of the matter. . . ." *Id.*, at 249. As the Court stated in *Anderson*:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Id., at 255. Thus, at the summary judgment stage of the case, the evidence of the party threatened with summary judgment is to be credited and all justifiable inferences must be drawn in its favor. *Adickes* v. *S.H. Kress & Co.*, 398 U.S., at 158-59; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

As this Court stated in *First National Bank of Arizona* v. *Cities Services Co.*, 391 U.S. 253, 288-89 (1968), to defeat summary judgment, "all that is re-

quired is that sufficient evidence supporting the claimed factual dispute be shown to require a jury . . . to resolve the parties' differing versions of the truth at trial." That is undeniably the case here. A rational trier-of-fact could easily have concluded that, in the totality of the circumstances, the promissory notes, which indisputably allow an annual 6 percent interest rate increase, better reflected the intent of the parties than the "ambiguous" language of the mortgage agreements.

Moreover, while federal courts may have the authority to grant summary judgment to the nonmoving party in appropriate circumstances, the failure of a party to make such a motion cannot possibly relieve it of the burden of establishing the absence of disputed material facts. Nor can the absence of a motion allow the court to draw inferences in the nonmoving party's favor, or excuse the court from resolving any doubt against granting summary judgment. In this case, respondents made no pretense that they were entitled to summary judgment. They did not move for summary judgment in the district court because they believed that the "relevant extrinsic evidence . . . must go to the jury that ultimately will decide the true and proper meaning to be given the language used [in the loan agreements]."[14] And on appeal they specifically acknowledged that the evidence was not so one-sided as to justify summary judgment in their favor.[15] In the face of these concessions, there was plainly no basis for the Ninth Circuit's implicit conclusion that a fair-minded jury could not return a

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[14] Plaintiffs' Opp., at 3.

[15] Appellants' Opening Brief, at 17.

verdict in HonFed's favor on the evidence already of record.

CONCLUSION

The decision below manifests what appears to be a disturbing trend in the courts of appeals to erode the rule laid down in *Fountain* v. *Filson*, and thereby to make hazardous the use of the summary judgment procedure established by Rule 56. Discouraging the use of the summary judgment in this fashion will undoubtedly undermine the goal of efficient and economical disposition of cases in the federal courts so recently reemphasized by this Court's decision in *Celotex*. Unless this trend is interdicted in this case, the continued vitality of summary judgment practice as an economical and efficient means for isolating factually inadequate claims and defenses will be seriously undermined. Few litigants will resort to Rule 56 knowing that, if they win in the district court but lose on appeal, they may forfeit the opportunity to litigate their claims or defenses fully at a trial.

Accordingly, the Court should grant this petition for a writ of certiorari.[16]

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[16] As suggested in the text *supra*, this Court might well choose to act summarily in this case by granting certiorari and reversing the decision below, as it did in *Fountain* v. *Filson* itself. Because respondents took the position on their appeal that they had no right to the entry of judgment in their favor, there is no concern that this Court's acting summarily in this case would unfairly disadvantage respondents.

January 4, 1989

Respectfully submitted,

*Theodore B. Olson
Larry L. Simms
Paul Blankenstein
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Petitioner
**Counsel of Record*

Of Counsel:

Richard R. Clifton
Susan Oki Mollway
CADES SCHUTTE FLEMING
& WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0423
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS II AND III AND MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

Defendant, Honolulu Federal Savings (HONFED), moved this court for summary judgment as to Count I, and to dismiss Counts II and III of plaintiffs' Amended Complaint. These matters came before this court on June 16, 1982, for hearing and argument. The court has considered the memoranda of parties and has examined the record and case law concerning these motions.

MOTION TO DISMISS COUNTS II AND III:

HONFED originally raised the defense of statute of limitations to Counts II and III of plaintiffs' original complaint. On December 18, 1981, this court heard and granted that motion, and on January 4, 1982, entered its order. Plaintiffs have since amended their complaint to allege equitable grounds for tolling the statutes.

Counts II and III of the Amended Complaint are identical to the original counts in that they allege failure to make necessary disclosures, in violation of H.R.S. § 407-87; and failure to provide accurate and complete disclosures on financing statements, in violation of H.R.S. § 477-2.[1] Plaintiffs have now added allegations of "fraudulent concealment" and "lulling". This court has already determined that absent some equitable basis, the counts should be dismissed by reason of the running of any and all relevant statute of limitations.[2]

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[1] Count I, on the meaning of the contract language, shall be considered *infra*; Counts IV and V of plaintiffs' complaint are not subjects of these motions.

[2] See this court's Order Granting Motion to Dismiss filed January 4, 1982; see also, *Pacific Concrete F.C.U. v. Kauanoe*, 62 Haw. 334 (1980). *Davis v. Edgemere Finance Co.*, 523 FS 1121, 1125-26 (D.C.M. 1981), citing *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974); *Steams v. Page*, 48 U.S. (7 How.) 818, 829 (1849).

To constitute fraudulent concealment such as to avoid the statute of limitations, the plaintiff must have plead, and the court must be able to draw the reasonable factual inference that:

1) there was concealment of facts by the party raising the statute;

2) the plaintiff failed to discover the facts which are now the basis of the action; and

3) the plaintiff exercised due diligence in seeking to discover those facts but some affirmative act of fraudulent concealment frustrated his discovery.

In evaluating those necessary elements, the applicable law depends upon the degree of affirmative conduct alleged or shown in perpetrating the fraudulent concealment.[3] Thus, if defendant has committed some affirmative act of fraudulent concealment such as to frustrate discovery, a court would be more justified in permitting avoidance of the statute of limitations. Put another way, a court might toll the statute only until plaintiff, exercising due diligence, would get such notice as to "impel a reasonable man in his position to make inquiry." *John Hopkins University v. Hutton*, 488 F.2d 912, 917 (4th Cir. 1973) (Field, J.) (quoting Friedman, *Delay as a Bar to Rescission*, 26 Cornell L.Q. 426, 432 (1941)), *cert. denied* 416 U.S. 916 (1974).

Plaintiffs, in their First Amended Complaint (FAC), have alleged that HONFED "fraudulently concealed, through words and conduct, its intention" and that plaintiffs were "lulled" into believing the interest rate could never be raised more than one and one-half percent (1-1/2%) per annum over the whole term of the loan. (FAC filed April

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[3] *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976); *City of Detriot v. Grinnel Corp.*, 495 F.2d 448, 461 (2nd Cir. 1974).

7, 1972, ¶¶ 48-61; pp. 19-23.) Plaintiffs admit in their FAC that they executed notes in 1963 and 1964; that each note was secured by a first mortgage; that at the time of closing HONFED did provide plaintiffs with a "Loan Settlement Statement", but not with duplicate copies of notes and mortgages.

A careful examination of plaintiffs' FAC indicates that while they have made bold and bare assertions of fraudulent conduct by defendant, nevertheless they have not set forth just what affirmative conduct of the defendant, amounting to such "fraudulent concealment" as would "lull" plaintiffs into lethargy, actually occurred. Plaintiffs merely state that the "variable interest rate" was not sufficiently explained by HONFED. This alone does not constitute "fraudulent concealment" sufficient to toll the statute of limitations. Even when this court gives the plaintiffs, as opposing parties, the benefits of all reasonable inferences in their favor, any examination of plaintiffs' allegations fails to indicate any "affirmative conduct" on defendant's part to "conceal" anything from plaintiffs or "lull" plaintiffs into inaction. Unlike *Cunha v. Ward Foods, Inc.*, 501 F.2d 820 (D.C. Haw. 1980), plaintiffs have neither pled nor shown any affirmative conduct such as to mislead them or conceal the "true nature" of defendant's actions. HONFED did not publish any intentionally or manifestly fraudulent statements concerning their loans; nor is there any indication of any affirmative acts to mislead plaintiffs or to lull them into inaction. Rather, the record, by plaintiffs' own account, indicates the plaintiffs entered into a contract for loans with full access to all documents.

The second element necessary to permit plaintiffs to avoid the statute requires "non-discovery" of the alleged "concealed" information. Plaintiffs offer affidavits to the effect that they did not know the meaning given their notes and mortgages by HONFED. While defendant argues the meaning was clear on the face of the documents, nevertheless this court, drawing all reasonable inferences

in favor of the plaintiffs as the non-moving party, for this motion assumes plaintiffs' ignorance and "non-discovery".

However, the third element to be satisfied in plaintiffs' quest to avoid the statute of limitations is that plaintiffs exercised "due diligence" in seeking to discover the facts upon which they now base their claim. Such diligence is not necessarily a one-shot inquiry, but at least a reasonable inquiry at the appropriate time is demanded.

It is conceded that at the closing of the notes and mortgages, the plaintiffs had access to all documents. Both parties had equal rights and obligations to examine those documents. A diligent examination of those documents would have then at least alerted a reasonable person to the possibility of interest increases exceeding one and one-half percent per annum over the whole life of the loan. Even if this court were to draw the most extreme inference in favor of the plaintiffs, viz., that a reasonable person would not read and ask questions about the terms of the notes and mortgages he/she was signing, nevertheless, the raising of the interest "to the max" in 1974 should again have put plaintiffs on notice and would "impel a reasonable man in [that] position to make inquiry." *John Hopkins University v. Hutton, supra.* Either of these dates is so distant that the possible bar of the statute of limitations becomes manifest.

MOTION FOR SUMMARY JUDGMENT ON COUNT I:

Plaintiffs in Count I of their FAC argue that any "increase or decrease in the annual interest rate on plaintiffs' respective notes *for the remaining term of the notes* is limited to a maximum of one and one-half percent (1-1/2%) per annum." (Emphasis added.) FAC, ¶ 32, p. 14. In the next paragraph, plaintiffs claim that increases "*over the original contract annual interest rate*" of more than one and one-half percent have been attempted by

defendant. (Emphasis added.) FAC, ¶ 33, p. 14.[4] Plaintiffs continue in Count I to offer their "reasonable interpretations" of the language in the notes, concluding that the "language quoted from the note is unclear, ambiguous and is subject to at least two interpretations . . . ." FAC, ¶ 38, p. 16. Finally, plaintiffs add that such ambiguities were not and could not have been discovered until 1981 because defendant "fraudulently concealed" its intentions to raise the interest and that defendant "lulled" plaintiffs into nonaction. FAC, ¶¶ 44-46, p. 18.

HONFED's position is that this court may examine the language of the notes to determine if such language is or is not ambiguous; if the court finds the language unambiguous, then it may determine the contract's meaning as a matter of law.[5] If, however, an ambiguity is evident, then extrinsic evidence may properly be admitted to help ascertain the intended meaning of the parties.[6]

The relevant language of the note is:

> It is hereby further agreed that the holder, at any time after three (3) years from the date of this note, *and from time to time thereafter*, may upon not less than three (3) months' written notice to the undersigned, decrease or increase the interest rate then in effect by not more than one and one-half per cent (1 1/2%) per annum, provided that after receipt of such notice the undersigned may within such three (3) months' period prepay the balance then remaining unpaid

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[4] This language used by plaintiffs operates adversely to their argument, as discussed more completely *infra* at p. 8.

[5] "Whether a contract is ambiguous is a question of law. . . ." *United States v. Sacramento Municipal Utility District*, 652 F.2d 1341, 1343-44 (9th Cir. 1981) and cases cited.

[6] *Restatement (Second) of Contracts*, §§ 200-204.

> without the payment of any penalty. [Emphasis added.]

The relevant language of the corresponding mortgage states:

> It is further agreed that the Mortgagee may at any time after three (3) years from the date of said note hereby secured, *and from time to time thereafter*, decrease or increase the rate of interest on said note by not more than one and one-half percent (1 1/2%) per annum, upon giving three (3) months' written notice to the Mortgagor, in which event the Mortgagor may within said three (3) months' period prepay the balance then remaining unpaid on said note without the payment of any penalty. [Emphasis added.]

As can be seen, the only noticeable difference between the two is the use of the phrase "on said note" in the mortgage in place of "then in effect" in the note. This is not significant and changes no meaning since the former is merely an incorporation by reference of the note into the mortgage. The meaning of both instruments is clear and unambiguous.

A fair and straight-foward reading of the language in the respective notes and mortgages indicates that, taken as a whole, the instruments permit HONFED, as holder of the notes, to increase (or decrease) the interest rate on the notes from time to time. However, HONFED's rights are limited by the following conditions: a three (3) year grace period after closing of the loan; three (3) months' written notice, during which time borrower may pay off the loan without penalty; any periodic increases (or decreases) are limited to a maximum of one and one-half percent ($1^1/_2$%) per annum from the interest rate then in effect.

To give either instrument the meaning plaintiffs suggest would amount to a rewriting of the contracts between the parties. The court would have to insert language to the effect that "all increases (or decreases) of the interest rate cannot vary more than one and one-half percent (1-$^1/_2$%) per annum *above or below the original interest rate on said note* . . . ." This the court cannot do. Plaintiffs' own language in their complaint shows that for them to succeed such additional terms would have to be inserted to vary the meaning of the instrument. (See n. 4, *supra*, p. 6.)

Based upon the above findings and conclusions of law, this court holds, as a matter of law, that plaintiffs' Counts II and III are barred by the applicable statute of limitations; that the contract language of the respective notes and mortgages is clear and unambiguous and are to be interpreted as indicated by this decision.

IT IS THEREFORE ORDERED that defendant's motion to dismiss Counts II and III is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment as to Count I is GRANTED.

DATED: Honolulu, Hawaii, November 2, 1982.

Martin Pence
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	Civil No. 81-0423
Plaintiffs,	)	
vs.	)	ORDER GRANTING MOTION FOR RECONSIDERATION AND REVERSING COURT'S ORDER OF MAY 6, 1983
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	Civil No. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR RECONSIDERATION AND REVERSING COURT'S ORDER OF MAY 6, 1983

Defendant Honolulu Federal Savings filed a Motion for Reconsideration of this court's May 6, 1983 Order. That Motion raised several objections to the court's Order, and directed this court's attention to facts and legal theories which had not been apparent to this court before.

Defendant contends that the May 6, 1983 Order erred in several respects. First, defendant argues that plaintiffs cannot, as a matter of law and fact, be allowed to choose the method by which increases in the interest rate are to be factored into the payment schedule. Defendant points out that most of the loans in question were issued for the maximum time period permitted by the law governing its loans. The C.F.R. regulations then in effect and controlling plantiffs' first mortgage loans set a 30-year limitation on their duration. Thus, even if plaintiffs were given the "choice" to either increase their monthly payments or to extend the repayment period, in most cases, because of that 30-year limitation, they would only have the right to *increase* each monthly payment.

Defendant also contends that because the first (1974) interest increase was implemented through a "unilateral" decision by HonFed, plaintiffs have waived any right to object to a similar approach being used with the 1981 increase.

Defendant's arguments have merit. After reviewing the law referenced by defendant in its latest brief, and after oral argument, this court concludes that the defendant is bound by the rules promulgated by the Federal Home Loan Bank Board and could not offer the plaintiffs an option which is foreclosed by controlling federal regulation. This court's earlier Order regarding the provision of an "option" for plaintiffs/borrowers cannot be applied.

The promissory notes are governed by the federal regulations in effect when the loans were made. As indicated

above, those regulations at that time set a 30-year limitation on the duration of first mortgage loans. *See* 12 C.F.R. § 545.6-1 (1963). Honfed had already attempted to accommodate borrowers by allowing them to extend their loan terms up to that limit, while at the same time offering them the alternative of increasing each monthly payment.

Defendant's second argument asserts that plaintiffs have waived any objection they might have had to the 1981 unilateral interest rate hike. The court finds this argument persuasive. Plaintiffs impliedly agreed to the methods implemented by defendant in 1974, and have thereby constructively waived any objection to those methods.

THE ESCALATION PROVISION

Defendant argues that this court's interpretation of the permissible interest increase provided for by the refinancing statement was not only erroneous, but was not even urged by the plaintiffs. Specifically, defendant contends that the "one time only" interpretation adopted by this court is contrary to the facts of this case and could not have been argued by any reasonable borrower.

Unfortunately, this court's Order of May 6, 1983, inaccurately reflected the court's opinion in one respect. On p. 5 of that Order, the sentence that reads, " . . . would justify a borrower's belief that the interest rate on his note could only be adjusted once during the term of the note," should read, " . . . would justify a borrower's belief that the interest rate on his note could only be adjusted once a year, for a maximum per year increase of 1.5%." This conclusion was supported by certain terms in the notes, including descriptions of incremental interest rate hikes. Defendant argues that the court's reliance on these descriptions of interest increases is misguided and cannot, as a matter of law, serve as the basis of a TILA violation. This court now agrees. In its Motion for Reconsideration, defendant highlighted for the court certain regulations which *require* a lender to set forth for the borrower the

very terms which this court, erroneously, previously found to be confusing. *See* 12 C.F.R. § 226.8(b)(8)(iii) and (IV). As such, this court cannot hold that those terms are misleading.

Defendant points out that the purpose behind TILA is to provide consumers with sufficient information to enable them to compare the available costs of credit. *Dixey v. Idaho First National Bank*, 677 F.2d 749, 751 (9th Cir. 1978). Despite certain differences between the terms of the notes and the provisions of the refinancing statement, plaintiffs were not at all precluded from credit shopping. The refinancing statement provided that upon learning of the 1981 interest increases, plaintiffs could prepay the balance of their outstanding loans without incurring any penalties, and could seek financing elsewhere. Credit shopping was, in fact, encouraged. Thus, the purpose behind TILA was served, despite certain word discrepancies in the HonFed instruments.

In light of the above and new aspects of the applicable law called to this court's attention by defendant's Memorandum in Support of Motion for Reconsideration, this court hereby VACATES its previous Order of May 6, 1983, and thereby dissolves the proposed class and withdraws any reference to payment of plaitiffs' attorneys' fees.

This court hereby GRANTS defendant's Motion for Summary Judgment as to Counts IV and V.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Sept. 7, 1983.

Martin Pence
UNITED STATES DISTRICT JUDGE

APPENDIX B

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	Nos. 83-2502/2503 D.C. Nos. C-81-0423-MP C-81-0459-MP MEMORANDUM*

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Argued and submitted - May 15, 1984

Decided - October 1, 1984

Appeal from the United States District Court
for the District of Hawaii
Martin Pence, District Judge, Presiding

Before: SCHROEDER and NORRIS, Circuit Judges, and MARSHALL,**District Judge.

Appellant homeowners challenge Honolulu Federal Savings and Loan Association's (HonFed) 1981 decision to raise the interest rates on their home loans by 1.0 percent per annum. They allege that the increase violates the terms of the loans, several Hawaii statutes, and the Federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* (1976) (amended 1980) (TILA). The district court dismissed two of the state claims on statute of limitations grounds and granted summary judgment for HonFed on the remaining claims. We affirm in part and reverse in part.

The district court correctly held that the statute of limitations bars the homeowners' claims under Hawaii Rev. Stats. § 407-87 (1976) and § 477-2 (Repealed 1982). Lulling is inapplicable to the present case, *see Maunian Hotel, Inc. v. Maui Pineapple Co.*, 52 Hawaii 563, 569-70, 481 P.2d 310, 314-15 (1971), and the homeowners have not pleaded sufficient facts to establish fraudulent concealment. *Au v. Au*, 63 Hawaii 210, 215, 626 P.2d 173, 178 (1981).

Summary judgment on the remaining claims was premature. In granting summary judgment against the homeowners' claim that the 1981 increase violated the terms of their loan agreements with HonFed, the district court held that the loan agreements' terms unambiguously per-

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** Honorable Consuelo Bland Marshall, United States District Judge for the Central District of California, sitting by designation.

mit HonFed to raise the interest rate 1.5 percent per annum every three months, or 6 percent per year. The court based its conclusion on the language of the promissory notes that allows HonFed "at any time after three (3) years from the date of this note, and from time to time thereafter" to increase the interest rate from the rate "then in effect."

The promissory notes, however, do not comprise the entire agreement that we must interpret. Hawaii law provides that where a promissory note and a mortgage are executed at the same time, they must be construed together "and the terms of either are qualified by any provision of the other. . . ." *Sanborn v. Chang Yau*, 32 Hawaii 420, 424 (1932). *See generally* 10 C.J.S. *Bills and Notes* § 45 (1938). Moreover, unclear language in a mortgage is resolved against the drafter. *State Savings & Loan Association v. Kauaian Development Co., Inc.*, 62 Hawaii 188, 613 P.2d 1315 (1980). The mortgages in the present case do not permit HonFed to raise the interest rate over the rate "then in effect," but over the interest rate "on said note." It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan.

We therefore conclude that the phrase "on said note" used in the mortgages is ambiguous because "there is a doubt" about its meaning. *See Government Employees Insurance Co. v. Franklin*,—Hawaii—,—, 662 P.2d 1117, 1119 (1983); *MPM Hawaiian, Inc. v. World Square*, 666 P.2d 622 (Hawaii Ct. App. 1983). The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements "susceptible to more than one meaning." *Air[illegible], Inc. v. Horizon Cargo Transport, Inc.*, -Hawaii-, 670 P.2d 1277, 1280 (1983). Accordingly, the parties should

the terms of the home loan agreements. *See Midkiff v. Castle & Cooke, Inc.*, 45 Hawaii 409, 420-22, 368 P.2d 887, 894 (1962).

It follows that whether the homeowners can claim that the 1981 refinancing statement violated the TILA and whether they have standing to bring a claim under Hawaii Rev. Stat. § 480-2 (1976) must await final determination on the amount of interest rate increase contemplated in the home loan agreements.

Affirmed in part, reversed and remanded in part.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0423
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

DECISION

Defendant Honolulu Federal Savings and Loan Association's ("HonFed") Motion for Summary Judgment came on for hearing on Wednesday, July 30, 1986. Susan Oki Mollway and Richard Clifton appeared for HonFed, and W. Gregory Chuck appeared on behalf of plaintiffs Harris N. Murabayashi, Miwako S. Murabayashi, William H. Ebina, Betsy S. Ebina and all other similarly situated borrowers. After examining the memoranda, exhibits, and deposition testimony, and hearing the arguments of counsel, the court granted summary judgment for HonFed on plaintiffs' remaining claims. This decision provides additional detail to the court's oral ruling.

I. Background

This action concerns a challenge brought by the above named homeowners in connection with home loans issued by HonFed in 1964. The original complaint set forth plaintiffs' "reasonable interpretation" of the language of the notes and argued that HonFed could not increase the interest rate more than one and one-half percent over the original six and one-quarter percent rate. According to plaintiffs, HonFed's 1981 interest rate increase therefore violated the terms of the home loan agreements.

In addition to Count I described above, HonFed allegedly failed to make adequate disclosure (Count II—H.R.S. § 407-87), filed to provide accurate and complete disclosures on financing statements (Count III—H.R.S. § 477-2), violated Federal Truth in Lending Laws ("TILA") and Federal Reserve Board Regulation "Z" (Count IV—15 U.S.C. § 1639, 12 C.F.R. 229), and committed unfair and deceptive trade practices (Count V—H.R.S. § 480-2). The court dismissed Counts II and III on statute of limitations grounds and granted summary judgment on the remainder of the complaint.

Plaintiffs challenged the orders of dismissal and summary judgment and in a memorandum opinion, the Ninth Circuit affirmed in part and reversed in part. While the court found that the statute of limitations barred the homeowners' claims under H.R.S. §§ 407-87 and 477-2, the panel went on to rule that summary judgment on the remaining claims was premature.

Construing the note and the mortgage together ("where a promissory note and a mortgage are executed at the same time, they must be construed together 'and the terms of either are qualified by any provision of the other. . . . [*citing* Hawaii law]' " Opinion at 2), the court found the phrase "on said note" ambiguous. Specifically, the court wrote:

> The mortgages in the present case do not permit HonFed to raise the interest rate over the rate "then in effect," but over the interest rate "on said note." It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan.

(*Id.*)

After finding an ambiguity in the mortgage based on doubt over the meaning of the phrase "on said note," the court went on to say:

> The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements "susceptible to more than one meaning." *Aigor, Inc. v. Hoizon Cargo Transport, Inc.*, 66 Haw. 590 (1983). Accordingly, the parties should be allowed to present extrinsic evidence to establish the terms of the home loan agreements.

See Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 420-422 (1962).

(*Id.* at 3.)

The Ninth Circuit then ruled that plaintiffs' claim that the 1981 refinancing statement violated the TILA and their state unfair/deceptive trade practices claim "must await final determination on the amount of interest rate increase contemplated by the home loan agreements." (*Id.*)

Thus, the mandate of the court of appeals called for the parties to gather extrinsic evidence to establish the terms of the home loan agreements. For purposes of the instant motion, the court must decide whether that evidence presents a sufficient disagreement regarding the propriety of HonFed's 1981 escalation to require submission to a jury, or whether the evidence is so one sided that HonFed must prevail as a matter of law. (*See Anderson v. Liberty Lobby, Inc.*, slip op. at 9, ___ U.S. ___, ___, 106 S.Ct. 2505 (June 25, 1986).)

II. Discussion

A. Extrinsic Evidence Gathered on Remand

HonFed deposed six of its current or former personnel, and of those six, none ever questioned the "congruency" of the escalation language in the promissory notes with the escalation language in the mortgages. Furthermore, five of the six HonFed people deposed testified consistently that the escalation clause in both the promissory note and the mortgage allowed HonFed to increase the interest rate by as much as one and one-half percent (with three months notice), and that HonFed could do so as often as once every year. (*See* HonFed's Memo in Support, Exhibit D at 14-16, 24, Exhibit E at 37-40, Exhibit G at 34-35, Exhibit J at 39, and Exhibit K at 41.) Although one former loan officer and marketing vice-president (Harry Endo) testified that he "had no idea, no understanding" about per-

missible increases under the escalation clause of either the mortgage or the note (*id.*, Exhibit L at 37-38), the court finds that Endo's testimony does not raise a question of fact regarding HonFed's intent. Instead, the testimony is simply of no aid in establishing the terms of the home loan agreements.

In addition to the testimony highlighted above, the court notes that HonFed's actions in 1974 and 1981 were consistent with the statements of its personnel that the interest rate could be raised one and one-half percent over the prior rate "then in effect."

In opposition to HonFed's motion, plaintiffs rely on the deposition testimony of Harris Murabayashi and William Ebina as evidence of a sufficient disagreement to create a question for the jury with regard to the terms of the home loan agreements. According to testimony at page 47-48 of Murabayashi's deposition (HonFed's Memo in Support, Exhibit M), Murabayashi asked a woman present when he signed his documents the meaning of the escalation provision contained in the mortgage and the note. As Murabayashi remembers, the woman said:

> Don't worry about it. It's in all our documents, our agreements. It's never been used before and it has only up to one and a half percent over the interest rate that I [sic] was signing for, six and a quarter, over the lifetime of the loan.

When asked whether he had a specific recollection that the woman said over the lifetime of the loan, Murabayashi replied, "Not specific but implied because if she had told me that this thing could go up every year I would never have signed it." (*Id.* at 48.) Murabayashi's further testimony reveals his "recollection" as nothing more than a conclusion based on the sense that "if she had told me that [the interest rate] can go up one and a half percent every time they felt like it I never would have signed it." (*Id.* at 50; *see also id.* at 52-57.) The court finds that

Murabayashi's testimony does nothing to establish the terms of the home loan agreements.

As for William Ebina, his testimony is even less helpful than Murabayashi's. Ebina claims that he was never told of HonFed's claimed right to raise the interest rate and that until the 1974 interest rate increase, he thought the rate was fixed at six and one-quarter percent. Plaintiffs claim that Ebina's testimony reveals a conflict between the statements of HonFed personnel that "we told everyone" and that Ebina's apparent contradiction goes to the reasonable expectations of the borrower. However, the court need only point out that Ebina's payment of the 1974 increase without complaint demonstrates that his expectations of a fixed rate mortgage were *not* reasonable. Thus, neither does the testimony of Ebina help resolve the ambiguity identified by the Ninth Circuit.

Lastly, plaintiffs claim that the eight percent default rate provided in the mortgage represents an internal inconsistency since it does not make sense for a lender to have the ability to raise the interest rate through an escalation clause to eight and three-quarters percent (or higher) when a defaulting borrower's interest rate is limited by the terms of the mortgage to eight percent. However, HonFed has many options under the default clause—and the eight percent per annum rate is just one of them. (*See* HonFed's Memo in Support, Exhibit B at 2, ¶ 4.) As a result, the default clause is not probative with respect to the terms of the home loan agreements.

B. Is There an Issue for the Jury?

As set forth in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate only when the pleadings and other submissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Filco v. Amana Refrigerator, Inc.*, 709 F.2d 1257, 1260 (9th Cir. 1983). In

addition, the indulgence required at the trial level mandates the court to view the evidence and draw all inferences in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). A corollary of the above is that a court must not *weigh* conflicting evidence. *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 412 (1st Cir. 1985).

The Supreme Court has recently noted that *Adickes* and other cases indicate that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party. *Cities Service*, 391 U.S. at 288-299. If the evidence is merely colorable [citations omitted], or is not significantly probative, *Cities Services, supra*, at 290, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, slip op. at 7, ___ U.S. ___, 106 S.Ct. 2505 (June 25, 1986).

The court recognizes that the resolution of the meaning of an ambiguous contract is for the jury. *FILMO v. Kaiser Aluminum*, 684 F.2d 776, 780 (11th Cir. 1982); *United States for Union Building Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568, 572 (9th Cir. 1978). However, to prevail at trial, plaintiffs must establish that the parties intended the loan documents to limit the permissible interest rate increase to one and one-half percent over the life of the loan.

Given plaintiffs' burden at trial, the most relevant citation in this case is not to a case involving the interpretation of ambiguous contracts, but instead to a Supreme Court case decided the same day as *Liberty Lobby*:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In

> such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, ___ (1986).

Celotex Corp. v. Catrett, slip op. at 5, ___ U.S. ___, 106 S.Ct. 2548 (June 25, 1986).

In this instance, defendants case is even stronger than the movants' case in *Celotex*. While there was no real dispute in *Celotex* that the movant need not provide affirmative evidence disproving the plaintiff's case (*see id.* at 1 (White, J., concurring) and *id.* at 1 (Brennan, J., dissenting)), certain members of the Court were not convinced that the moving party had met its burden of production. In this case, not only has HonFed satisfied its initial burden of production, it has also met the ultimate burden of persuasion, "which always remains on the moving party. [Citations omitted]." *Id.* at 2 (Brennan, J. dissenting). In fact, the court finds the state of defendant's evidence so overwhelming that were the case to go to trial, the court would grant a motion for directed verdict under Fed. R. Civ. P. 50(a).

Accordingly, the court GRANTS defendant HonFed's motion for summary judgment. Counsel for defendant will prepare the order.

DATED: Honolulu, Hawaii, Aug. 11, 1986.

Martin Pence
UNITED STATES DISTRICT JUDGE

APPENDIX D
[Filed June 3, 1988]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	NO. 86-2503 DC # CV-81-423-MP MEMORANDUM*

Appeal from the United States District Court for the District of Hawaii Martin Pence, District Judge, Presiding

Argued and Submitted April 6, 1988
Honolulu, Hawaii

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges

* This disposition is no appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

Harris N. Murabayashi and others brought a class action against Honolulu Federal Savings and Loan Association (HonFed). The plaintiffs were borrowers at 6.25 percent on 20 year home mortgages in the 1960's from HonFed. They sought a declaratory judgment that the maximum increase permissible by the terms of their loans was 1.5 percent. They also sought damages for violation of the federal Truth in Lending laws, 15 U.S.C. 1640, *et seq.*, and Regulation Z issued thereunder, 12 C.F.R. 226. They sought further relief under the Unfair Practices Act, H.R.S. § 480-2.

The district court granted summary judgment in favor of HonFed. This court reversed. *Murabayashi v. Honolulu Federal Savings and Loan Association*, unpublished opinion, October 1, 1984. The district court had held that the terms of the loan agreements "unambiguously permit HonFed to raise the interest rate 1.5 percent per annum over three months, or 6 percent per year." Slip op. p.2. We, however, observed that the notes did not comprise the entire agreement to be interpreted. Each promissory note had been executed together with a home mortgage. Under Hawaii law, the note and the mortgage had to be interpreted together. The mortgages did not permit HonFed to raise the interest rate over the interest rate "on said note." We held as follows:

> It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan. We therefore conclude that the phrase "on said note" used in the mortgages is ambiguous because "there is a doubt" about its meaning. Slip op. p.2.

We further noted that "unclear language in a mortgage is resolved against the drafter." But we permitted the

parties to present extrinsic evidence to establish the terms of the agreements.

On remand six persons connected with HonFed were deposed by the plaintiffs. James Hallstrom, former chairman of the board of HonFed, testified that he understood the note permitted the bank to raise the interest rate "1 1/2 percent per annum and then as often as we care to do that, that is what we always explained to people." He said again that he understood "we had the right to escalate 1 1/2 percent every year, with proper notice." Similar testimony was offered by Richard Hee, a former loan officer of HonFed, that each year HonFed had the right to increase the interest rate 1 1/2 percent.

Two other former officers of HonFed said there was no discussion at the bank about the language of the mortgage and the language of the note. Richard H. Fukagawa, a former executive vice president of HonFed, testified categorically that there were no discussions regarding the language of the mortgage comparing it with the language of the note. Isamu Harry Endo, a former loan officer and vice president for marketing, testified that he had no understanding whether there was any limit on interest rate escalations during the life of the loan.

It is apparent that the testimony of Hallstrom and Hee takes a view of the note and mortgage which is different from the face of the note. The face of the note, as already construed by the district court, permits an escalation, after three years, of 6 percent per year over the interest rate in existence the previous year. All that is needed is for HonFed to give the appropriate three month notice four times each year. As was admitted by counsel for HonFed in oral argument, this plain meaning of the note leads to astronomical interest rates in the later years of a 20-year note. Neither Hee nor Hallstrom believed that that was what the bank could get. Consequently, they must have

believed that the interest rate was somehow held in check by the terms of the mortgage.

The mortgage, as this court has already held in its prior opinion, was ambiguous and had to be construed against its drafter, HonFed. Not only was the mortgage ambiguous in the way this court has already held. There was a further ambiguity in that in the event of default as to any term of the mortgage, HonFed had the right to interest at the rate of 8 percent per annum. It is, of course, difficult to believe that an interest rate on its note could be escalated by the bank well above 8 percent while the default provision provided for only 8 percent.

HonFed appears to have misunderstood the burden that was placed upon it by the prior decision of this court. The court had found an ambiguity in the mortgage. HonFed had the burden of proving that the meaning of the mortgage, construed against it, did not control the note. HonFed failed to meet this burden. Instead, the testimony of Endo and Fukagawa show that HonFed had not confronted the problem. The testimony of Hallstrom and Hee show that the bank had an understanding of a note that was contrary to its plain meaning. We now accordingly hold that the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest on the loan was a raise of 1 1/2 percent during the life of the loan.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS DISPOSITION.

WALLACE, Circuit Judge, concurring and dissenting:

We have a single issue before us: did the district court err in granting summary judgment to HonFed. I agree

that it did so because the note and the mortgage are ambiguous and HonFed's extrinsic evidence does not resolve the ambiguity in favor of HonFed. We need not and I would not go any further. Therefore, I disagree with the majority that we should conclude that the maximum permissible interest on the loan was a raise of 1 1/2 percent during the life of the loan. Rather, we should simply reverse the summary judgment for HonFed and remand for trial. On remand, the plaintiffs could, of course, bring their own motion for summary judgment on this issue.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	NO. 86-2503 DC # CV-81-423-MP ORDER

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges

Judges Reinhardt and Noonan have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Wallace votes to grant the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88 - 1112

(2)

In The

Supreme Court of the United States

October Term, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, MIWAKO S. MURABAYASHI, WILLIAM H. EBINA, and BETSY S. EBINA,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DUANE W. DRESSER
One Embarcadero Center
Suite 840
San Francisco, California
94111-3613
(415) 397-4600

Counsel of Record for Respondents

Of Counsel:

W. GREGORY CHUCK
CHUCK, JONES & MACLAREN
745 Fort Street, Suite 1814
Honolulu, Hawaii 96813
(808) 533-3614

GODFREY L. MUNTER, JR.
Law Offices of Godfrey L. Munter
The Alcoa Building, Suite 1670
San Francisco, California 94111
(415) 421-0980

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Respondents cannot agree with petitioner's characterizations of the questions presented because, as will be discussed hereinbelow, those characterizations do not accurately and completely reflect the proceedings in the courts below. Accordingly, respondents submit that the question presented is as follows:

1. Whether a federal court of appeals on a second appeal from summary judgment involving the construction of ambiguous documents drafted by the moving party may construe those documents in favor of the non-moving party after the moving party has had the opportunity but fails to establish its proposed interpretation of those documents by extrinsic evidence.

LIST OF PARTIES

All of the parties are named in the caption. Durine Chiyo Kanai, named as a respondent in the petition, withdrew as a prospective class representative by stipulation of the parties and order thereon filed on April 8, 1986. The named respondents brought their action as a class action on behalf of all similarly situated borrowers. By order filed May 6, 1983 (Resp.App.1) a class was certified as to Count IV of the first amended complaint but subsequently dissolved by order dated September 7, 1983. (Pet.App.B.)

Rule 28.1 is inapplicable to respondents.

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No. 88-1112

In The

Supreme Court of the United States

October Term, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, MIWAKO S. MURABAYASHI, WILLIAM H. EBINA, and BETSY S. EBINA,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This case involves the construction of ambiguous language contained in form promissory notes and mortgages drafted by petitioner Honolulu Federal Savings and Loan Association (HonFed) and executed by respondent borrowers in connection with their home loans. Respondents have consistently contended since filing their complaint in 1981 that under the language of these loan documents the maximum permissible increase in the interest rates on the loans was 1.5% during the term of

the loans. Petitioner's initial motion for summary judgment on the ground that interest increases were not so limited was granted by the District Court in 1982, the court holding that HonFed was permitted to raise the interest by 1.5% every three months, or 6% a year. (Petition, p. 6, Pet.App.A, 7a; Pet.App.B, 14a-15a) In 1984, the Court of Appeals reversed the summary judgment in HonFed's favor holding that the note and mortgage had to be construed together, that the language of the mortgage was ambiguous and under Hawaii law should be construed against the drafter but that the parties should be allowed to present extrinsic evidence to establish the meaning of the home loan agreements. Upon remand the parties conducted discovery directed toward the construction of the document terms. Contrary to the District Court's previous holding, two officials of HonFed testified that HonFed could raise the interest by 1.5% only *once* a year. (Pet.App.D, 28a) Nevertheless, the District Court again granted summary judgment in HonFed's favor. Respondents again appealed and another panel of the Court of Appeals again reversed noting that the testimony of HonFed's officials showed an understanding of the note that was contrary to its plain meaning. (Pet.App.D, 29a) Accordingly, the court held that "the note read together with the mortgage was ambiguous," that the ambiguity is construed against the drafter and, as respondents had contended for some seven years, that the maximum permissible increase in interest was a raise of 1.5% during the life of the loans.

The court's decision was not based upon any "new theory" as HonFed contends but on established principles of Hawaii law applicable to the construction of notes

and mortgages. HonFed was given ample opportunity to resolve the ambiguity appearing in its own documents and it suggests nothing either factual or legal that was not before the Ninth Circuit. Accordingly, respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the unpublished judgment and opinion of the Ninth Circuit Court of Appeals filed on June 3, 1988.

OPINIONS BELOW

In addition to the opinions attached to the petition, there is attached hereto as Appendix 1 the unreported May 6, 1983 opinion of the District Court granting respondents' motion for summary judgment as to Count IV, certifying the plaintiff class with respect thereto, awarding costs and attorney's fees, and granting petitioner's motion for summary judgment as to Count V. (Upon petitioner's motion for reconsideration, the District Court in its order of September 7, 1983 [Pet.App.B, 9a-12a] vacated its May 6, 1983 order as it related to Count IV, granted petitioner summary judgment thereon, and dissolved the class.)

STATEMENT OF THE CASE

Respondents are borrowers from HonFed who in the period 1964-1965 executed pre-printed form promissory notes and mortgages prepared by HonFed. A typical note provided for an interest rate of 6.5% and contained the following clause:

> "IT IS HEREBY FURTHER AGREED that the holder, at any time after (3) years from the date of this note, and from time to time thereafter, may upon not less than three (3) months' written notice to the undersigned, decrease or increase the interest rate then in effect by not more than one and one-half percent (1-1/2%) per annum. . . . "

The contemporaneously executed mortgages, however, provided in pertinent part as follows:

> "IT IS FURTHER AGREED that the Mortgagee may at any time after (3) years from the date of said note hereby secured, and from time to time thereafter, decrease or increase the rate of interest *on said note* by not more than one and one-half percent (1-1/2%) per annum. . . . " (Emphasis supplied)

In 1974 HonFed raised the interest rate by 1-1/2 percent. In 1981 HonFed notified its borrowers that it was raising the interest rate another 1% whereupon respondents filed their original complaint in November 1981 alleging among other things, that the provisions meant that the maximum permissible increase in the interest rate was 1-1/2% over the term of the notes.[1]

On April 27, 1982 HonFed filed its motion to dismiss Counts II and III and for summary judgment on Count I.

---

[1] Count I of the complaint and amended complaint sought declaratory relief on this basis. Counts II and III sought relief under Hawaii law for fraudulent concealment and incomplete disclosure. Count IV sought relief under the federal Truth-In-Lending Act and Count V sought relief under Hawaii's Unfair Trade Practices Act. Counts II and III were dismissed on limitations grounds and are no longer in issue.

In its supporting memorandum HonFed recognized the central issue in this case was as follows:

> "At the core of the first claim contained in Plaintiffs' First Amended Complaint - and indeed of the entire action - is Plaintiffs' allegation that certain language in the notes and mortgage is ambiguous and further is subject to being interpreted to preclude any interest rate increases that total more than 1-1/2 percent."
>
> (Memorandum in Support of Motion, p. 14)

In their opposition, respondents reiterated their position as follows:

> "Plaintiffs assert that the clauses permit the Defendant HONOLULU FEDERAL to decrease or increase the total rate of interest on the loans for the duration of the term of the loan by a maximum of one and one-half percent (1-1/2%) per annum."
>
> (Plaintiffs' Memorandum In Opposition To Defendant's Motion For Summary Judgment filed May 28, 1982, p. 8)

By its order of November 2, 1982, the District Court dismissed Counts II and III and granted HonFed's motion for summary judgment on Count I holding that under the loan documents HonFed could increase the interest by 1.5% every three months, or 6% each year. (Pet. p. 6; Pet.App.A, 1a-8a)

Earlier, on May 19, 1982, respondents filed their motion for class certification which stated in part as follows:

> "Every member of the Plaintiff class alleges that the loan contract evidenced by the mortgage and promissory note is, at best, ambiguous and should be construed against the drafter."

(Plaintiffs' Motion For Class Certification, p. 7)

On December 22, 1982 HonFed moved for summary judgment on Counts IV and V and on January 20, 1983 respondents filed their cross-motion for summary judgment on Counts IV and V. By its order filed on May 6, 1983 (Appendix 1 hereto), the District Court granted HonFed summary judgment on Count V, granted respondents summary judgment on Count IV, certified the class with respect thereto, and awarded respondents costs and attorney's fees. Upon HonFed's motion for reconsideration, the court vacated its order as to Count IV, dissolved the class, and granted HonFed summary judgment on Count IV. (Pet.App.B, 9a-12a) It was from this order, which disposed of the last of the five counts, that respondents took their first appeal to the Ninth Circuit.

The Court of Appeals rendered its opinion on this first appeal on October 1, 1984. (Pet.App.B, 13a-16a) It held that under Hawaii law the terms of a promissory note and mortgage must be construed together and that "unclear language in a mortgage is resolved against the drafter." (*Id.* at 15a) Further, the court held that the phrase in the HonFed mortgages "on said note" was unclear and "ambiguous because 'there is a doubt' about its meaning." (*Ibid.*) Continuing,

> "The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements 'susceptible to more than one meaning.' "
>
> (*Ibid.*)

The court concluded as follows:

> "Accordingly, the parties should be allowed to present extrinsic evidence to establish the terms of the home loan agreements."
>
> (*Ibid.*)[2]

In its petition for rehearing of this decision HonFed maintained that "Extrinsic evidence is inappropriate in this case" and that

> "Under the circumstances of this case, extrinsic evidence concerning the interpretation of the Mortgage would serve no purpose."
>
> (Petition for Rehearing dated October 12, 1984, pp. 11, 12)

Following remand the parties took depositions of several HonFed officials and of respondents concerning their understanding of the loan documents. As noted above, two HonFed officials testified that HonFed could raise the interest by only 1.5% each year. Following discovery HonFed again moved for summary judgment which the District Court granted by its order of August 11, 1986. (Pet.App.C, 17a-25a)

Respondents again appealed from this grant of summary judgment against them and while it is true that respondents did not cross-move for summary judgment, their briefs left no doubt that they contended the HonFed documents should have been construed in their favor.

---

[2] This sentence in Appendix B contains an inadvertent elision. See the complete sentence quoted at the foot of 19a.

"*The District Court erred when it failed to interpret the ambiguities of the mortgage in favor of plaintiff borrowers* or to permit a jury to interpret the documents."

(Appellant's Opening Brief, p. 7. Emphasis supplied)

" . . . HonFed silently sidesteps the problem of the ambiguity and the mandate of this court that the ambiguity be resolved in Plaintiffs' favor, . . . "

(Appellants' Reply Brief, p. 4)

"The law of the case as set forth in the Court's prior opinion is that, without more, the ambiguity is to be resolved in the borrowers favor."

(*Id.* at p. 6)

In view of the Court of Appeals' first opinion, these assertions of respondents, and the contradictory testimony of HonFed's officers, it can come as no surprise that the Court of Appeals the second time around resolved the ambiguities against HonFed and in favor of respondents. (Pet.App.D, 26a-30a) The court held as follows:

"We now accordingly hold that the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest on the loan was a raise of 1-1/2 percent during the life of the loan."

(*Id.* at 29a)

REASONS FOR DENYING THE WRIT

A. Certiorari Should Not Issue Merely To Review Evidence And The Parties' Different Views Of That Evidence

Respondents submit that the challenged decision was correct as a matter of law. The ambiguity in the mortgages initially found by the Court of Appeals was compounded by HonFed's testimony upon remand creating an ambiguity in the meaning of the notes.

Unlike the defendants in *Fountain v. Filson*, 336 U.S. 681 (1949), HonFed has been apprised from the outset of respondents' theory and claim concerning construction of the loan documents and HonFed was afforded the opportunity to obtain and present evidence in support of its contrary interpretation. Indeed, it points to no additional evidence which it could present were the matter again remanded to the District Court.

But even if error were assumed, this Court "[does] not grant a certiorari to review evidence and discuss specific facts." (*United States v. Johnston*, 268 U.S. 220, 227 (1925)) It is abundantly clear that the challenged decision here turns on the particular facts and documents involved in this case and that review "would be of no importance save to the litigants themselves." (*Rudolph v. United States*, 370 U.S. 269, 270 (1962)) As stated in *Ross v. Moffitt*, 417 U.S. 600, 616, 617 (1974), review by this Court "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

B. *Fountain v. Filson* Is Inapposite

Shorn of its plumage, HonFed's petition relies entirely upon *Fountain v. Filson, supra,* which is clearly distinguishable. There, the Filsons brought suit claiming a $6,000 interest in New Jersey realty on the theory of resulting trust. Fountain obtained summary judgment on the "sole basis" that New Jersey law did not permit imposition of a resulting trust under the circumstances. (336 U.S. at 682) The Court of Appeals agreed that no resulting trust could arise but directed entry of judgment in the Filsons' favor on the grounds that depositions taken in the action showed the existence of a personal obligation for the $6,000. This Court understandably reversed this judgment because

> "the order was made on appeal on a *new issue* as to which the opposite party had no opportunity to present a defense before the trial court."
>
> (*Id.* at 683. Emphasis supplied)

Continuing, the court observed that, unlike the instant situation

> "there was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by the court on her motion for summary judgment was the claim that there was a resulting trust."
>
> (*Ibid.*)

The situation here bears no resemblance to that before this Court in the *Fountain* case. Respondents have consistently pleaded and urged their claim that the loan documents limited interest increases to a maximum of

1.5%. Upon the occasion of its first motion for summary judgment, HonFed recognized this issue was "At the core of" respondents' entire action. The Court of Appeals in its first decision held that the mortgage was ambiguous and should be construed in respondents' favor but remanded to give HonFed the opportunity to obtain and offer evidence to establish the meaning of the notes and the mortgages. On the second appeal, respondents urged that the documents should be construed in their favor and after examining the evidence, the Court of Appeals agreed.

There was simply no "new issue," legal or factual, on the second appeal as to which HonFed had not had an opportunity to litigate and, significantly, HonFed fails to describe any evidence or point of law which was not before the trial court and the Court of Appeals. Accordingly, and in direct contrast to *Fountain*, no purpose would be served by once again remanding the issue to the District Court.

C. Summary Judgment In Favor Of A Non-Moving Party Is Not Erroneous Where The Moving Party Has Had The Opportunity To Litigate The Issue And No New Facts Would Be Developed On Remand

HonFed's depiction of the horrors which would supposedly ensue if the Ninth Circuit's decision is allowed to stand is vastly overdrawn if not wholly illusory. An inherent risk in moving for summary judgment is that the court will agree that there is indeed no genuine issue of

material fact but that the facts established dictate judgment for the other party. Accordingly, summary judgments in favor of the non-moving party are not unusual and have been repeatedly sanctioned by both federal trial and appellate courts. (See, 6 Moore's Federal Practice, ¶56.12; 6 Pt. 2 Moore's Federal Practice, ¶56.27[2]; 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2720, pp. 28-35) As this Court recently recognized in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)

> "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."

Typical of such cases and quite similar to the instant situation is *Potenze v. New York Shipping Ass'n., Inc.*, 804 F.2d 235 (2nd Cir. 1986), cert.den. 107 S.Ct. 1955 (1987), cited but not discussed by HonFed.

> "Summary judgment decided on submission is subject to plenary, *de novo* review. This court also has the power in appropriate circumstances to reverse the district court's grant of summary judgment and to grant summary judgment for the nonmoving party. This is appropriate when the issues have been fully developed, the opponent has had a full and fair opportunity to litigate the question, and no new facts would be developed on remand."
>
> (*Id.* at 239. Citations omitted)

Viger v. Commercial Ins. Co. of Newark, N.J., 707 F.2d 769 (3rd Cir. 1983), involved the interpretation of a document, there an insurance policy. Plaintiff's motion for summary judgment was granted by the district court and on appeal, the Third Circuit directed entry of summary

judgment in favor of defendant which had not moved. The court observed that

> "although Commercial did not file a cross-motion for summary judgment, which would have been the better practice, we will reverse the judgment for plaintiffs and direct the district court to enter summary judgment for defendant."
>
> (*Id.* at 774)

In *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982) the Ninth Circuit affirmed a summary judgment granted by the district court in favor of the non-moving defendant. The court observed as follows:

> "In the instant case, the parties had every opportunity to explore and expound the issues in the prayer for equitable relief and did so to the extent they deemed advisable."
>
> (*Id.* at 312)

A court is not precluded from granting summary judgment in favor of the non-moving party even though the latter "alleges that a genuine issue of fact remains for trial. . . ." (*Federal Deposit Ins. Corp. v. Sumner Financial Corp.*, 376 F.Supp. 772, 776 (M.D. Fla. 1974))

Here, as in the cited cases, the central issue in the case has been exhaustively developed and HonFed has had a full opportunity to litigate the question. For example, in its answering brief on the second appeal, it expended some 19 pages in analyzing the extrinsic evidence adduced by the parties concerning the documents in question. (Appellee Honolulu Federal Savings And Loan Association's Answering Brief served October 21, 1987, pp. 10-29) Petitioner has described no new issues or

facts which would be developed on remand. Accordingly, such remand would be an idle act and would result only in additional expense and further delay of this long-delayed litigation.

CONCLUSION

For the reasons set forth above it is submitted that the petition for certiorari be denied.

January 23, 1989

Respectfully submitted,

DUANE W. DRESSER
One Embarcadero Center
Suite 840
San Francisco, CA
94111-3613
(415) 397-4600

Counsel of Record
for Respondents

Of Counsel:

W. GREGORY CHUCK
CHUCK, JONES & MACLAREN
745 Fort Street, Suite 1814
Honolulu, Hawaii 96813
(808) 533-3614

GODFREY L. MUNTER, JR.
Law Offices of Godfrey L. Munter
The Alcoa Building, Suite 1670
San Francisco, California 94111
(415) 421-0980

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al., Plaintiffs, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, Defendant.	CIVIL NO. 81-0423
HARRIS N. MURABAYASHI, et al., Plaintiffs, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association, Defendant.	CIVIL NO. 81-0459

ORDER

This action was brought by five plaintiffs who took out mortgage loans from the defendant in 1963 and 1964. This court has already ruled on Counts I through III of the plaintiffs' complaint. The parties have now filed cross motions for summary judgment on Counts IV and V, the only remaining Counts.

Count IV alleges that the defendant violated the Federal Truth in Lending Laws, including but not limited to 15 U.S.C. § 1639 (1982), and Sections 226.8(a) and (j) of Federal Reserve Board Regulation "Z", 12 C.F.R. 226.

Count V alleges that the defendant violated Section 480-2 of the Hawaii Revised Statutes, which prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce.

More specifically, plaintiffs allege that there are three discrepancies between their original promissory notes and the refinancing agreements sent out by the defendant in October 1981. First, plaintiffs allege that the promissory notes state that interest can be decreased as well as increased over time, whereas the refinancing statement fails to mention the possibility of decreased interest rates.

Second, plaintiffs allege that the promissory notes, by their terms, do not allow for the monthly payments on them to be raised, or the maturity date extended in any way.

Finally, plaintiffs contend that although this court's ruling establishes that the promissory notes allow interest to be increased up to 6% per year (as interpreted by this court), the refinancing statements only allow for a total increase of 1.5%. Plaintiffs also have a motion for class certification pursuant to Rule 23(c)(1), pending before this court. This court continued its ruling on plaintiffs' motion until it had ruled on defendant's motion to dismiss Counts II and III, and its motion for summary judgment on Count I. These motions were the subject of this court's November 2, 1982 Order.

At this time, a ruling on plaintiffs' motion for certification is appropriate so that the court's ruling regarding the remaining Counts in Plaintiffs' complaint will be applicable to all parties similarly situated. The court believes that there is enough detail in the pleadings and exhibits on file, along with the affidavits submitted by plaintiffs, to preclude the necessity of an evidentiary hearing on the matter of certification. *See Jones v. Diamond*, 519 F.2d 1090, 1098 (5th Cir. 1975). Consequently, IT IS HEREBY ORDERED that plaintiffs' motion for certification pursuant to Federal Rule of Civ. Proc. 23(a) and (b) be granted, and that the class be designated to include all those persons who have both of the following: (1) an outstanding promissory note whose terms are set forth on a form identical to that submitted as Exhibits A-C, attached to Plaintiffs' First Amended Complaint (filed with this court on April 21, 1982), and (2) a refinancing statement identical to those appended as Exhibits F and G to Plaintiffs' First Amended Complaint. The class is bound only by the court's ruling regarding the remaining allegations in the complaint.

The plaintiffs shall submit on or before May 17, 1983, a proposed form of notice consistent with the requirements of F.R.Civ.P. Rule 23(c)(2). The defendant shall submit its objections to the proposed form and suggestions for a proposed form of notice within ten (10) days thereafter.

In ruling on Count IV, it is necessary to consider each of the three discrepancies/misrepresentations alleged by plaintiffs. Plaintiffs' first allegations can be disposed of in defendant's favor because, as the defendant points out,

TILA speaks only of increases in payments and/or percentage rates. See 12 C.F.R. § 226.8 (b)(8) (1982).

Plaintiffs' second allegation can also be disposed of in defendant's favor. Although it is true that the original notes did not contain any terms regarding the right of the defendant to raise the amount of each payment and/or increase the number of payments, such adjustment is necessarily implied from the fact that the interest rate on the notes could be raised up to 6% per annum. Since this court has already ruled in its November 2, 1982 Order that the plaintiffs were charged with knowledge of that allowable percentage increase, plaintiffs must also be charged with knowledge that some sort of adjustment in the payment terms would have to be made should the interest rate be raised.

Notwithstanding the above holding, plaintiffs cannot be bound by the terms unilaterally imposed by the defendant. Since the promissory notes failed to include any specific provision for either an increase in number of payments or an increase in the amount of each payment upon raising of the interest, the defendant cannot now claim the right to choose the method by which the interest rate increase will be incorporated.

Consequently, IT IS HEREBY ORDERED that plaintiffs be allowed to choose the method by which the increase interest rates will be factored into their payment schedules. Plaintiffs must be afforded the option of either increasing the term of their note or increasing the amount of each scheduled payment.

Plaintiffs' third allegation requires that this court interpret the terms of the refinancing statements for the

first time. Plaintiffs contend that the refinancing terms differ from those of the original notes, and that the differences between the two agreements are material. Plaintiffs further argue that the plain meaning of the refinancing terms limits the increase in interest to 1.5%.

After careful review of the refinancing statement, this court concludes that its terms do differ from those contained in the notes originally issued to plaintiffs. The refinancing statement does not contain the words "from time to time thereafter," and the statement contains language stating that interest may be increased "by up to 1.5% per year." The above language is followed by a detailed description of how an increase of less than 1.5% would affect the borrower's payment schedule. This language would underscore a borrower's belief that increases were limited to 1.5%.

This court's original order interpreting the terms of the promissory notes relied heavily on wording in the notes stating that interest could be raised "from time to time thereafter," and that this periodic rise was above and beyond the interest "then in effect." (See p.7 of November 2, 1982 Order.) The failure of the refinancing statement to include the words "from time to time thereafter" is significant because it would justify a borrower's belief that the interest rate on his note could only be adjusted once during the term of the note.

For the above reasons, this court concludes that the plain meaning of the terms of the refinancing statement differs from that of the notes themselves.

The issue then becomes whether this difference is material and constitutes a violation of TILA and § 480-2

of the Hawaii Revised Statutes. In *Dixey v. Idaho First Nat. Bank*, 677 F.2d 749 (9th Cir. 1982), the Ninth Circuit addressed the issue of materiality in discussing the purpose and coverage of the Truth in Lending Act:

> The Act requires disclosure of credit terms to consumers so that potential borrowers will be able to compare the available costs of credit. The most important disclosures mandated by the Act are those upon which consumers should compare competing loans, the finance charge and annual percentage rate . . . "[T]he most important information in a credit purchase is that which explains the differing net charges and rates."

Id., 677 F.2d at 751 (Citations omitted.)

The *Dixey* court language makes it clear that discrepancies and nondisclosures regarding the interest rate applicable to a loan cannot be considered de minimus. Thus, plaintiffs are entitled to redress under the Act.

As to Count V, summary judgment must be rendered in defendant's favor. As a matter of law, plaintiffs cannot show that the defendants intended to fraudulently induce them into paying finance charges in excess of those called for under their respective notes. This court has already ruled that defendant's interpretation of the allowable increases in interest is valid. The mere fact that defendant subsequently issued to borrowers a refinancing statement which allows for only 1.5% increases is insufficient to give rise to a cause of action under Haw. Rev. Stat. § 480.2. Plaintiffs did not rely on this statement in entering into the agreements with Honolulu Federal. They cannot show any injury to their business or property by virtue of the discrepancies between the notes and the

Refinancing Statement. Consequently, plaintiffs fail to meet the standing requirements of § 480.13.

The viability of Count V required a determination by this court that the language in the notes themselves limited the permissable increase in interest to 1.5% (See ¶ 71 of Plaintiff's First Amended Complaint) Given this court's November 2, 1982 Order holding otherwise, Count V must fail.

DAMAGES

Plaintiffs seek declaratory relief and statutory damages as provided under 15 U.S.C. § 1640. In the case of a class action, no minimum recovery is applicable, and the court must consider a number of factors in determining the appropriate damages. Those factors include the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons intentionally affected, and the extent to which the creditor's failure of compliance was intentional. The evidence before the court at this time is insufficient to determine whether an award of damages under 15 U.S.C. § 1640(a) is appropriate, and if so, the amount of such award. The parties are therefore instructed to submit further evidence and authority addressing the issue of actual damages within the context of a class action.

Plaintiffs are entitled to an award of costs and attorneys fees under 15 U.S.C. § 1640(a)(2). See *Hannon v. Security Nat. Bank*, 537 F.2d 327 (9th Cir. 1976). Defendants are hereby ordered to pay such reasonable fees and costs as can be shown to have been incurred by plaintiffs in the prosecution of this action.

Finally, under the power vested in this court by 28 U.S.C. § 2202 (1982), this court hereby orders defendant, on or before May 17, 1983, to submit a proposed draft to this court and opposing counsel of a notice to class members containing a clear description of the permissible interest rate increase and the methods by which each class member may choose to have such potential increase incorporated into his payment schedule. Plaintiffs shall have seven (7) days thereafter to file any objections or suggestions thereto.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 5, 1983.

/s/ Martin Pence
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
FEB 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, *et al.*,

Respondents.

REPLY MEMORANDUM

Of Counsel:

Richard R. Clifton
Susan Oki Mollway
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200

*Theodore B. Olson
Larry L. Simms
Paul Blankenstein
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* (2d ed. 1988) 4

REPLY MEMORANDUM

The Ninth Circuit deprived petitioner Honolulu Federal Savings and Loan Association ("HonFed") of any opportunity that it may have had to succeed in this litigation by resolving against it an issue that neither the parties nor the district court had ever previously addressed.

Respondents' complaint challenged a 1 percent interest rate increase by petitioner in 1981. The district court held that provisions of the promissory notes authorizing 1.5 percent interest rate increases on three months notice were "clear and unambiguous" and upheld the increase. In a 1984 decision, the court of appeals reversed because the mortgages securing the notes contained slightly different terminology and "the parties should be allowed to present extrinsic evidence to establish the terms" of the loan instruments construed together. Pet. App. C at 19a. After discovery and the presentation of evidence, the district court granted HonFed's summary judgment motion. It found the evidence "overwhelming" and upheld "the propriety of [HonFed's] 1981 [1 percent] escalation" of respondents' interest rates. *Id.* at 20a

On respondents' second appeal, the court of appeals shifted focus from the 1 percent increase in dispute to the maximum increase the loan instruments might permit. Reasoning that the "face of the note . . . permits an escalation . . . of 6 percent per year over the interest rate in existence the previous year," the court determined that the interest rate must somehow have been "held in check by the terms of the mortgage." Pet. App. D at 28a-29a. Since petitioner had failed to prove that "the meaning of the mortgage, con-

strued against it, did not control the note," and that 6 percent per year interest rate increases were justified, the court of appeals, in essence, directed judgment for respondents. *Id.* at 28a.

Thus the court of appeals transformed the case from one involving the permissibility of a 1 percent increase in 1981 to a new issue of whether HonFed could prove that it was entitled to raise interest rates 6 percent per annum. Without being given any opportunity to respond to the burden placed upon it by the court of appeals, HonFed is now faced with an adverse judgment even though it never had reason to address the issue now deemed decisive in this case.

The harsh lesson of the Ninth Circuit's decision is thus that a successful summary judgment movant may not only experience an erroneous reversal on appeal,[1] but also have its victory replaced with defeat without any opportunity to remedy or even respond to a previously unidentified defect in its case. As HonFed's certiorari petition demonstrates, that lesson is flatly contrary to this Court's holding in *Fountain* v. *Filson*, 336 U.S. 681 (1949), and seriously undermines summary judgment principles recently re-endorsed by this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

Respondents attempt to discount the significance of this case without refuting the profoundly negative implications of the court of appeals' ruling on sound summary judgment practice. They also attempt to dis-

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[1] As noted in the certiorari petition (note 8), while HonFed has not sought review of that part of the court of appeals' decision reversing summary judgment in its favor, it has not conceded the correctness on that ruling.

tinguish the *Fountain* v. *Filson* rule without overcoming the plain fact that the "6 percent issue" that is the basis for the judgment in their favor was framed first in the court of appeals' 1988 opinion, or that the issue had not been expressly addressed by the parties at any prior stage of the case.

A. The Ninth Circuit's Decision Warrants Review Because It Undermines The Efficacy Of Summary Judgment Practice

Respondents argue that, even if the Ninth Circuit's decision violated the rule of *Fountain* v. *Filson*, further review is unwarranted because the case is of no importance '"save to the litigants themselves.'" Respondents' Brief in Opposition ("Res. Opp.") at 9. While the underlying dispute regarding the interest rates on respondents' loans may well be of importance only to the parties, a larger principle is at stake.

Federal court litigants may be justifiably reluctant to move for summary judgment if the price of success in the district court carries with it the prospect that a federal court of appeals may not only reverse the favorable result but also, as here, direct the entry of judgment for the opposing party on the basis of a new legal theory without affording the movant the opportunity to develop its case on remand so that it can meet the defect identified by the appellate court.[2]

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[2] Respondents contend that HonFed has overstated the adverse consequences because "[a]n inherent risk in moving for summary judgment is that the court will agree that there is indeed no genuine issue of material fact but that the facts established dictate judgment for the other party." (Res. Opp. at 11-12). But even assuming that an appellate court has the authority to enter summary judgment in appropriate situations,

The predictable result will be that cases that should be resolved by summary judgment will instead proceed to trial, thereby further burdening the federal judicial system, and unnecessarily consuming the resources of the parties as well. *See Celotex Corp.* v. *Catrett*, 477 U.S. at 327.

This case is an apt vehicle for reinvigorating the *Fountain* v. *Filson* rule—an area that the Court has not expressly addressed in forty years—and thereby underscoring for the various federal courts of appeals the need for scrupulous adherence to fundamental summary judgment principles.

B. HonFed Was Deprived Of The Opportunity To Remedy The Defect In Its Case Identified By The Ninth Circuit

Recognizing that the Ninth Circuit was not free to grant summary judgment in their favor if doing so

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the use of that power to deprive a litigant of the right to meet the case against it would have precisely the consequences described by HonFed. Consequently, absent the clearest case, the "appellate court should not order summary judgment for the non-moving party, but should remand for further development of the case, which may include the making of a motion for summary judgment by the prior non-moving party who prevailed on the appeal." 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.12 at 169 (2d ed. 1988). The cases respondents cite hold nothing more. *See Potenze* v. *New York Shipping Ass'n., Inc.*, 804 F.2d 235 (2d Cir. 1986) (summary judgment by appellate court only appropriate when party against whom judgment is to be entered has had full and fair opportunity to litigate question and no new facts would be developed on remand), *cert. denied*, 481 U.S. 1029 (1987); *Viger* v. *Commercial Ins. Co. of Newark, N.J.*, 707 F.2d 769, 774 (3d Cir. 1983) (no genuine facts in dispute as to issue decided on appeal); *Cool Fuel, Inc.* v. *Connett*, 685 F.2d 309, 312 (9th Cir. 1982) (summary judgment by appellate court allowed only when adverse party had full and fair opportunity to "ventilate" the issues involved).

unfairly deprived HonFed of the opportunity to meet its "burden," respondents try to distinguish *Fountain* v. *Filson* on its facts. According to respondents, "[t]he situation here bears no resemblance to that . . . in *Fountain* . . ." because there was "simply no 'new issue,' legal or factual, on the second appeal as to which HonFed had not had an opportunity to litigate . . . ." (Res. Opp. at 10-11). The record of the proceedings below, including respondents' arguments at both the trial and appellate court levels, however, unquestionably shows that the 6 percent issue surfaced first in the Ninth Circuit's 1988 opinion, and that the court of appeals erroneously denied HonFed the opportunity to meet that newly announced standard.

First, contrary to what they intimate (Res. Opp. at 10-11), the fact that respondents had always maintained that the loan documents limited interest rate increases to a maximum of 1.5 percent did not in the factual context in which the case arose give HonFed any reason to believe that in order to prevail it had to prove a right to raise rates by 6 percent each year. The loans in question were made in 1964. In 1974, HonFed raised interest rates by 1.5 percent, and in 1981 by 1 percent. Respondents' action challenged the 1981 rate increase. To defeat respondents' claim and validate the 1981 increase—what the respondents now agree was the "core issue" in this case (Res. Opp. at 5, 11)—HonFed merely had to demonstrate a right under the loan documents to raise interest rates by an additional 1 percent over what respondents maintained was the maximum allowable rate increase. HonFed did so to the complete satisfaction of the district court, which found the evidence

in this regard "so overwhelming that were the case to go to trial, the Court would grant a motion for directed verdict . . . ."[3] Pet. App. C at 24a. Whether HonFed had the authority to raise rates by any greater amount was and is a wholly academic question. Yet, the court of appeals elevated that to the central critical issue in the case.

Second, the Ninth Circuit's 1984 decision on respondents' initial appeal did not frame the 6 percent issue. In that opinion, the court held only that it was unpersuaded that HonFed could raise interest rates by more than a maximum of 1.5 percent over the life of the loan because the loan documents, taken together, were susceptible to more than one meaning. Nowhere in that opinion is there the slightest indication that those instruments were not susceptible to a construction that interest rates could be increased by 1.5 percent each year, or that HonFed could not meet its burden of resolving the perceived ambiguity in the loan documents by extrinsic evidence of a right to raise rates by that amount. The court of appeals remanded the case to the district court to allow the parties to present extrinsic evidence establishing the terms of the loan agreement without any indication of what evidence would or would not suffice.

Perhaps the most persuasive evidence that the 6 percent issue was not identified by the 1984 appellate decision as HonFed's burden are the subsequent proceedings on remand. Plainly, the district court did

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[3] The court of appeals never explicitly expressed any disagreement with the district court's assessment of the evidence supporting HonFed's right to raise interest rates by 1.5 percent each year.

not understand that to be HonFed's burden as manifested by the fact it granted summary judgment to HonFed on the basis of extrinsic evidence that HonFed could increase interest rates by 1.5 percent each year over the life of the loans. And contrary to what they now suggest (Res. Opp. at 5, 11-12), respondents did not oppose HonFed's summary judgment motion on the ground that HonFed had fallen short of showing a right to raise interest rates by 6 percent. Rather, respondents opposed HonFed's motion because material facts were allegedly in dispute. According to respondents' summary judgment opposition, "there is ample extrinsic evidence—evidence as to the surrounding circumstances—evidence of what was said, what was done when the documents were executed—that must go to the jury that ultimately will decide the true and proper meaning to be given to the language used."[4] Certainly, had the Ninth Circuit's 1984 decision even arguably put the burden on HonFed to establish a right to raise rates by 6 percent annually, respondents would have made that argument forcefully in the district court. That respondents did not shows powerfully that the 6 percent issue was not identified by the Ninth Circuit until announced in the 1988 decision under review. *See Ithaca College* v. *N.L.R.B.*, 623 F.2d 224, 229 (2d Cir.) (court of appeals should not direct judgment when dispositive issue identified on appeal not addressed below), *cert. denied*, 449 U.S. 975 (1980).

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[4] Plaintiffs' Memorandum In Opposition To Motion For Summary Judgment, dated July 14, 1986, at 3. Indeed, respondents' summary judgment opposition concluded with the request that "the matter [should be] set for trial." *Id.* at 11.

Third, while respondents did argue on the second appeal that the "ambiguous" loan documents should be construed in their favor, the context in which that argument was made shows that respondents' sole point was that HonFed's evidence that it could raise interest rates by 1.5 percent each year was insufficiently certain to resolve the purported ambiguity in the loan documents, not that HonFed failed to show that it could raise rates in greater amounts and more often than it did.[5] Indeed, nowhere in their appellate briefs did respondents argue that judgment should be entered in their favor because HonFed failed to meet its "burden" of establishing a right to raise rates by 6 percent.[6]

Finally, respondents argue repeatedly that no purpose would be served by again remanding the case for HonFed has failed to describe the evidence that it would then present to the district court. (Res. Opp. at 11). There is no reason that HonFed need at this

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[5] *See* Appellants' Reply Brief at 4-6, dated November 27, 1987.

[6] In fact, respondents' appellate brief states that "the matter cannot be said to be beyond doubt so as to preclude trial and permit Summary Judgment . . . ." Appellants' Opening Brief at 18, dated September 18, 1987. Respondents now contend, however, that even though they resisted summary judgment on the basis of disputed material facts, the court of appeals' award of summary judgment in their favor was nonetheless proper. (Res. Opp. at 13). Respondents do not explain—as they cannot—why the absence of a motion on their part should make summary judgment easier to obtain. As pointed out in HonFed's certiorari petition (at 20-23), any doubt as to the existence of a triable issue must be resolved against the moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Thus, since respondents at all times maintained that a triable issue existed, summary judgment in their favor was patently erroneous.

stage describe in detail the evidence that it would submit on remand. As pointed out in its certiorari petition (at 19), however, had the 6 percent issue been fairly framed at an earlier stage in the case, HonFed would have adduced testimony and other evidence that the loan documents contemplated precisely what the notes stated: that after three years and upon three months written notice, it could raise rates then in effect by up to 1.5 percent. It would have explained that while this provision might have authorized increases up to 6 percent each year, competitive pressures would, in practice, have precluded any such increases. Evidence of other loan agreements might have been submitted to show how similar rate increase provisions were understood to operate. Also, while some HonFed officers and employees testified at depositions that they intended interest rate increases to be no more than 1.5 percent per year in practice, there was some testimony, and there could be additional testimony on remand that greater increases were possible. *See* HonFed's Memorandum In Support of Motion For Summary Judgement at 7-9 (July 2, 1986).

The crucial issue before this Court is not, however, whether HonFed will be successful on remand, but rather whether the court of appeals' ruling deprived HonFed of the opportunity to present evidence sufficient at least to raise a genuine factual issue, and then ultimately to persuade a jury that it could raise rates by considerably more than the amount of the 1 percent increase actually at issue in the case. No serious question exists but that the Ninth Circuit unfairly deprived HonFed of that opportunity.

CONCLUSION

That the Ninth Circuit ignored the holding in *Fountain* v. *Filson* in this case is beyond any doubt. The impact of the court of appeals' egregiously erroneous ruling on petitioner is so unduly harsh and its potential adverse affect on summary judgment practice so substantial that it must be set aside in the exercise of this Court's supervisory authority over the federal judiciary. As suggested in HonFed's certiorari petition, the Court might well choose to act summarily by granting certiorari and reversing the decision below, as it did in *Fountain* v. *Filson*.

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Respectfully submitted,

*Theodore B. Olson
Larry L. Simms
Paul Blankenstein
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Petitioner

**Counsel of Record*

Of Counsel:

Richard R. Clifton
Susan Oki Mollway
CADES SCHUTTE FLEMING & WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200